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No. 89-878

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN R. KNIGHT, PETITIONER

v.

UNITED STATES CENTRAL INTELLIGENCE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld the determination by the Director of Central Intelligence, under his authority to "protect[ ] intelligence sources and methods from unauthorized disclosure," 50 U.S.C. 403(d)(3), not to disclose certain records under the Freedom of Information Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 872 F.2d 660. The order of the district court (Pet. App. B1-B4) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1-C2) was entered on May 10, 1989. A petition for rehearing was denied on August 15, 1989 (Pet. App. D1). On November 6, 1989, Justice White extended the time within which to petition for writ of certiorari to and including December 4, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner seeks disclosure, under the Freedom of Information Act (FOIA), 5 U.S.C. 552, of certain records of the Central Intelligence Agency relating to the sinking of the Greenpeace vessel Rainbow Warrior in the harbor of Auckland, New Zealand, on July 10, 1985. The Rainbow Warrior had been preparing to monitor and protest a scheduled nuclear weapons test to be conducted by France. On September 22, 1985, the prime minister of France publicly admitted that two French intelligence agents, acting under orders from senior levels of the French government, had been responsible for the sinking of the vessel. Pet. App. A4-A6.

On October 4, 1985, petitioner sought disclosure under FOIA of all documents in the possession of the CIA that dealt with the Rainbow Warrior incident. Pet. App. B1-B2. The CIA informed petitioner that it could not disclose any documents, or any portions of documents. Pet. App. A7-A8.[1] Petitioner then moved under *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), to compel the CIA to file public affidavits, indexing the contents of the documents and explaining the reasons for their withholding. The CIA filed two *Vaughn* affidavits, one of which discussed eight documents and the other one of which discussed an unstated number of additional documents. The CIA also submitted an affidavit which contained classified

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[1] The CIA forwarded three documents to the Defense Intelligence Agency, which disclosed some portions and withheld others. The CIA also forwarded another document to the Department of State, which also disclosed some portions and withheld others. The two agencies justified the withholdings under Exemption 1 of the FOIA, 5 U.S.C. 552(b)(1), which exempts from mandatory disclosure matters that are properly classified in the interest of national defense or foreign policy. Pet. App. A6-A7. Petitioner does not challenge these withholdings.

information for *ex parte in camera* review by the district court in order to explain more fully the justifications for withholding the documents. Pet. App. A8-A9. The CIA then moved for summary judgment, arguing that the documents were exempt from disclosure in their entireties under two alternative grounds. First, the CIA argued that the documents were properly classified for national defense and foreign policy reasons, and thus came within FOIA's Exemption 1, 5 U.S.C. 552(b)(1). Second, the Agency argued that the documents came within Exemption 3, 5 U.S.C. 552(b)(3), which excludes from coverage by FOIA "matters that are * * * specifically exempted from disclosure by statute," because the Director of Central Intelligence (Director or DCI) has determined that the documents should not be disclosed, pursuant to his statutory "responsib[ility] for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 403(d)(3). The CIA maintained that the district court could uphold these exemption claims based on the public affidavits alone, but that if it concluded that it could not do so, it should uphold the exemption claims based on the *in camera* submissions.

2. The district court concluded that the public affidavits were not adequate, standing alone, to justify the exemption claims. Pet. App. B3-B4. It thus turned to the *in camera* affidavit, as well as the documents themselves, which the CIA had also submitted for *ex parte in camera* review. *Ibid.* After "thoroughly reviewing" these materials, the district court concluded that the documents were properly withheld and that the petitioner was not entitled to them.[2] Pet. App. B3-B4. The court thus granted summary judgment for the CIA. Pet. App. B4.

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[2] The district court in its order did not explicitly state that it based its decision on the *in camera* affidavit, but it noted that the CIA had filed that affidavit, that the public affidavits were inadequate, and that

3. The court of appeals affirmed. Pet. App. A1-A25. Relying on this Court's decision in *CIA* v. *Sims*, 471 U.S. 159 (1985), the court of appeals determined that it could not "second-guess[ ]" the DCI's judgment that documents could reveal intelligence sources and methods, in the absence of bad faith or some other compelling showing that the Director had erred. Pet. App. A13, A24.

The court of appeals noted first that this Court in *Sims* established that 50 U.S.C. 403(d)(3) qualifies as a withholding statute under Exemption 3.[3] Pet. App. A15. The appeals court also observed that *Sims* made clear that the Director has " 'wide-ranging authority' to protect sources and methods." Pet. App. A15-A16 (quoting *Sims*, 471 U.S. at 177). Echoing this Court, the appeals court concluded, "[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." Pet. App. A17 (quoting *Sims*, 471 U.S. at 180).

The court then turned to a detailed discussion of the two publicly filed affidavits, which set forth the specific findings by the CIA of the danger to intelligence sources and methods from any disclosure. Pet. App. A17-A21. The court emphasized as typical the statement about one document in one of the affidavits that "This excerpt contains sensitive, finished foreign intelligence concerning political matters in a particular part of the world. *Knowledgeable individuals could recognize from the specific information provided the*

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it based its decision on "reviewing the documents, the exemptions claimed, and the explanations for how National Security could be affected." Pet. App. B2-B3. This latter remark would thus appear to be a reference to the *in camera* affidavit.

[3] Petitioner does not challenge this ruling.

possible identity of the source and the methods whereby the information was obtained." Pet. App. A18 (quoting Saderholm Declaration). Applying the reasoning set out in *Sims* to these affidavits, the court concluded that once the Director had made a determination that classified documents "could reveal intelligence sources and methods and thus must be protected," the court would not second-guess his determination "[i]n the absence of bad faith, or some other compelling showing that [the Director] has abused his broad discretion." Pet. App. A21, A24.[4] Accordingly, the court upheld the exemptions on the basis of Section 403(d)(3) alone, without having to reach the question whether the documents were also exempt under Exemption 1.[5]

ARGUMENT

The court of appeals reviewed and properly disposed of the factual dispute at issue here. Its holding is fully in compliance with this Court's recent decision in *Sims*. Contrary to petitioner's contention, there is no current conflict with the decisions of the District of Columbia Circuit. Further review is therefore unwarranted.

1. This Court in *Sims* held that the Director's authority "to protect all sources of intelligence information from disclosure" under 50 U.S.C. 403(d)(3) is "very broad." 471 U.S. at 168-169. The Court emphasized that the plain

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[4] The court of appeals found "no evidence of, or even an explicit allegation of, bad faith," and it rejected possible implications of bad faith. Pet. App. A22-A24. Petitioner does not appear to challenge this holding.

[5] The CIA did not claim Exemption 1 for any portion of any document for which it did not also claim Exemption 3. Thus, by upholding the Exemption 3 claim in full, the court disposed of the entire case without reaching Exemption 1.

language of the statute made clear "the express intention of Congress" to grant the CIA "sweeping power" to protect its intelligence sources and methods: "The 'plain meaning' of [Section 403(d)(3)] may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." *Sims*, 471 U.S. at 169. The Court in turn ruled that the legislative history of Section 403(d)(3) confirmed the "broad power" that Congress gave the Agency to control disclosure of intelligence sources. See 471 U.S. at 170-173.

Thus, this Court recognized that the protection afforded by Section 403(d)(3) is not limited to "confidential or nonpublic intelligence sources." *Sims*, 471 U.S. at 169; see also *id.* at 174-177. Rather, it covers a wide variety of individuals and data. Within the first group are all "persons [who] provided, or were engaged to provide, information the Agency needs to fulfill its statutory obligations with respect to foreign intelligence." *Id.* at 174. In addition, the Director can rely on Section 403(d)(3) to withhold "superficially innocuous information" on the ground that it might enable an observer to identify an intelligence source. 471 U.S. at 178.[6]

The CIA must be able to "tender as absolute an assurance of confidentiality as it possibly can." *Sims*, 471 U.S. at 175. "We seriously doubt," the Court noted, "whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only

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[6] As the Court concluded, "bits and pieces of data 'may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.' " *CIA* v. *Sims*, 471 U.S. 159, 178 (1985) (quoting *Halperin* v. *CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980)).

after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information." *Id.* at 176. In addition, the Court noted that "the mere explanation" of why information must be withheld could convey valuable information to those gathering foreign intelligence. *Id.* at 179. Thus, in a passage that the court of appeals quoted and relied upon (Pet. App. A17), this Court ruled that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." 471 U.S. at 180. "The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference," the Court concluded, "given the magnitude of the national security interests and potential risks at stake." *Id.* at 179.

In the wake of this sweeping language, the court of appeals was entirely correct when it held that the role of the courts in reviewing a claim of exemption under Section 403(d)(3) is limited. The court of appeals carefully established, as did this Court in *Sims*, that the Director had determined that each of the classified documents sought could reveal intelligence sources and methods and thus had to be protected. See Pet. App. A21; see also *id.* at A17-A20 (reviewing justifications in public affidavits given for nondisclosure). The court further established that there was no evidence of bad faith, or any other specific and compelling evidence that brought into serious question the judgment of the Director. Beyond that, the court of appeals properly concluded that petitioner's challenge to the judgment of the Director and his designees concerning the dangers of disclosure must fail, because any such challenge calls on the courts to second-guess the Director on matters of foreign intelligence, an area beyond the competence of the courts.

See Pet. App. A21-A22. Petitioner does not suggest what function he wishes the courts to serve in this case, other than to indulge in such second guesses. The court of appeals recognized that *Sims* confirmed the broad discretion exercised by the Director; the court therefore properly upheld the Director's decision not to disclose the requested documents.[7] Pet. App. A24-A25.

2. Petitioner nevertheless contends (Pet. 13) that the decision of the court of appeals is in conflict with several decisions of the D.C. Circuit, which has made the CIA's claims under Exemption 3 "the subject of vigorous and protracted litigation." Assuming for the sake of argument that petitioner is correct in so characterizing these D.C. Circuit cases, all of the cases he cites predate this Court's decision in *Sims*. Those cases give no clue as to whether or to what degree the D.C. Circuit would still adhere to any previous decisions which placed more significant substantive or procedural limits on the Director's power to invoke Section 403(d)(3). Indeed, *Sims* itself overturned a D.C. Circuit

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[7] Contrary to petitioner's contention (Pet. 11-12), the decision of the court of appeals is not in conflict with the requirement of 5 U.S.C. 552(a)(4)(B) that the district courts decide claims of exemption under the FOIA de novo. This Court in *Sims* made clear that the district courts' determinations of exemption must take into account the authority granted the Director under 50 U.S.C. 403(d)(3). See *Sims*, 471 U.S. at 174-175, 179. For the same reason, there is no conflict over the need to make an adequate public record (Pet. 15) or to segregate exempt from non-exempt portions of the documents (Pet. 18). The court of appeals found on the facts of this specific case that the public record was as full as necessary (it was supplemented, in any event, with a detailed *in camera* record) to confirm that the CIA met the limited standard set in *Sims* for establishing that documents are exempt from disclosure under Section 403(d)(3). Similarly, no portions of the documents were outside the scope of the exemption, so no such portions needed to be segregated from exempt portions.

decision that had imposed a substantive limitation on the scope of Section 403(d)(3).

In the five years since this Court handed down its decision in *Sims*, the D.C. Circuit has not spoken on the application of Section 403(d)(3).[8] But at least three district court decisions in the D.C. Circuit have interpreted *Sims* as imposing a highly deferential rule like the one applied by the court of appeals below. See *Fitzgibbon* v. *CIA*, Civil Action Nos. 79-0956 and 86-1885 (D.D.C. May 19, 1989), appeal pending, Nos. 89-5213 and 89-5214 (D.C. Cir.); *Allen* v. *Department of Defense*, 658 F. Supp. 15, 19-21 (D.D.C. 1986) (upholding CIA's claims under both Exemption 1 and Exemption 3 based on broad standard of *Sims*); *United States Student Ass'n* v. *CIA*, 620 F. Supp. 565, 570-571 (D.D.C. 1985). The district courts in the D.C. Circuit thus do not believe that any arguably more stringent standard in the decisions of the D.C. Circuit survived *Sims*.

In any event, petitioner exaggerates the degree to which the D.C. Circuit required the courts to challenge the judgment of the Director under Section 403(d)(3) prior to *Sims*. This Court in *Sims* quoted from or cited (471 U.S. at 178-179) several decisions of the D.C. Circuit that granted broad deference to the Director in applying Section 403(d)(3). See *Gardels* v. *CIA*, 689 F.2d 1100 (D.C. Cir. 1982); *Halperin* v. *CIA*, 629 F.2d 144 (D.C. Cir. 1980); see also *Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978) (invocation of state secrets privilege by Secretary of Defense). And the pre-*Sims* cases cited by petitioner give no reason to think that the D.C. Circuit would reach any different conclusion

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[8] The lack of reported decisions in that time span is itself notable, given the frequency with which the D.C. Circuit had decided CIA cases in the years previous to *Sims*. It suggests that the courts and litigants have largely accepted *Sims* as dampening particularly "vigorous and protracted litigation" in this field. Pet. 13.

concerning the Director's exercise of discretion in this case than did the court of appeals below.[9] Finally, the D.C. Circuit, both before and after *Sims*, has agreed that summary judgment could be granted on the basis of agency affidavits, if they contained "reasonable specificity of detail" and were not called into question by contrary evidence or evidence of bad faith. See, *e.g.*, *Halperin*, 629 F.2d at 148.[10]

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[9] In *Allen* v. *CIA*, 636 F.2d 1287, 1293-1294 (1980), the D.C. Circuit explicitly relied on the reasoning adopted in one of the appeals court's decisions at issue in *Sims*, later declared invalid by this Court. All the other cases cited by petitioner turned on fact-specific determinations that are not at odds with the one made here. See *Miller* v. *Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) (upholding Agency claim under Exemption 3 requiring resolution that gives "substantial weight" to Agency's determinations and "depends less on the content of specific documents" than do other exemptions); *Paisley* v. *CIA*, 712 F.2d 686 (D.C. Cir. 1983) (declining to hold materials exempt from disclosure under Speech or Debate Clause, remanding for consideration of, *inter alia*, claim of exemption under Section 403(d)(3)); *McGehee* v. *CIA*, 697 F.2d 1095, 1112-1113 (D.C. Cir. 1983) (remanding for *in camera* inspection of documents given finding of bad faith on part of CIA); *Military Audit Project* v. *Casey*, 656 F.2d 724 (D.C. Cir. 1981) (affirming summary judgment in favor of Agency on basis of extensive affidavits); *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (requiring filing of public affidavit justifying exemption on ground of Section 403(d)(3) in as much detail as possible, before recourse to review of *in camera* affidavit by district court).

[10] While the D.C. Circuit labels its standard one for general use in FOIA cases (see, *e.g.*, *King* v. *United States Dep't of Justice*, 830 F.2d 210, 217 (1987) (concerning disclosure under Exemption 1)), it has noted that inquiries concerning claims of exemption under Section 403(d)(3) "depend[ ]less on the content of specific documents than the other exemptions do." *Miller*, 730 F.2d at 777; *Goland* v. *CIA*, 607 F.2d 339, 350 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980). The Fifth Circuit, while neither articulating nor qualifying a standard so explicitly, evidently considered with some care the content of the claims made in the affidavits in this Section 403(d)(3) case, and will decline to accept an agency affidavit called into question by a "compelling show-

Indeed, petitioner does not venture beyond an abstract claim of conflict in the standards set by the circuits to proffer any argument that would have led the D.C. Circuit to question the Director here. Rather, petitioner argued in the court of appeals that, in his own judgment, it did not seem logical that documents in the possession of the CIA concerning the sinking of the Rainbow Warrior could implicate the CIA's foreign intelligence role. See Pet. C.A. Br. 27-28; *id.* at 32. This type of attack is grounded only on speculation. It does not rise to the type of contrary evidence or "compelling showing" that would make the D.C. Circuit or any other circuit question that the Director, not petitioner or the courts, is in the best position to determine issues of foreign intelligence interests. Under such circumstances, the issue presented here does not warrant further review.

Finally, even if the public affidavits had been held insufficient, the district court upheld the Director only after examining the documents themselves *in camera*, as well as the CIA's *ex parte in camera* affidavit. Petitioner has presented no reason to suppose that had the court of appeals felt it necessary to examine the *in camera* documents, it would have come to a different conclusion.

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ing" that the Director has abused his discretion or a showing of bad faith. Pet. App. A24. The approaches of the circuits appear to come to similar ends. Compare the affidavits approved as sufficient in *Goland*, 607 F.2d at 351, with that approved at Pet. App. A18.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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